Supreme Court, U.S.
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No. 09-317

IN THE

Supreme Court of the United States

CITY OF PATTERSON,
Petitioner,

vs.

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA and
MORRISON HOMES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FIFTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process clause of the United States Constitution require an affordable housing fee levied upon developers of residential subdivisions to be reasonably related to the need for affordable housing created by the residential subdivision?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, City of Patterson, is a municipality with no publicly held stock.

Respondents are:

(1) Building Industry Association of Central California.
(2) Morrison Homes, Inc.

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I.

OPINIONS BELOW

On January 30, 2009, the California Court of Appeal, Fifth Appellate District filed the Opinion that is reported at 171 Cal.App.4th 886 (2009); and on March 2, 2009, the court filed the Order Modifying Opinion, Certifying Opinion for Partial Publication. (A copy of the Opinion and Order Modifying Opinion are attached hereto as Appendix A.) On March 20, 2009, the Court of Appeal filed the Order Modifying Opinion, and Denying Rehearing [Certified for Publication] that is reported at 172 Cal.App.4th, 444a. (A copy of this Order is attached hereto as Appendix B.) On June 17, 2009, the California Supreme Court, en banc, denied Petitioner's request for a petition for review and requests for depublication of the opinion. (A copy is attached hereto as Appendix C.) The Judgment After Trial of the Superior Court for the County of Stanislaus was filed February 1, 2008. (A copy is attached hereto as Appendix D.)

II.

JURISDICTION

The provision conferring jurisdiction for this petition is Rule 10(c) in that the decision of the California Court of Appeal has decided an important question of Federal law in a way which conflicts with relevant decisions of this Court.

III.

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is Section 1 of the 14th Amendment of the United States Constitution which provides in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

IV.

STATEMENT OF THE CASE

The statement of the case is set forth in the Court of Appeal Opinion at 171 Cal.App.4th, 886, 889 (Appendix A, p. A-2) as follows:

> Morrison Homes, Inc. (Developer) obtained a development agreement and tentative subdivision maps for the contraction of two residential subdivisions in Patterson, California. At the time those documents were approved, the City of Patterson (City)[1] allowed developers to pay a fee of $734 per house in lieu of building affordable

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[1] For purposes of this opinion, the term "City" refers to the governmental entity and the term "Patterson" refers to the geographical area governed by that entity.

> housing. About three years later, City increased this fee to $20,946 per house and sought to apply the increased fee to Developer's two residential projects among others.
>
> Developer sued City claiming that the increased fee violated (1) its vested property rights, and (2) its contractual rights under the agreement.... The trial court found that the increased in-lieu fee was permitted under section 4.5(d)(ii) of the development agreement and the amount of the increase was reasonably justified. The court entered judgment accordingly, and Developer appealed.[2]

In the Opinion at 171 Cal.App.4th 886, 889, (Appendix A, pages A-2 to A-3) the Court of Appeal stated that the term "reasonably justified" must be interpreted under legal standards applied to such fees and stated "those legal standards require that the amount of a development fee be limited to the cost of that portion of a public program attributable to the development."

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[2] Developer is joined in the appeal by the Building Industry of Central California, a California nonprofit corporation with members that own property within Patterson and are affected by the in-lieu fee.

V.

ISSUES RAISED BY CITY IN STATE COURTS

In City's Respondent's Brief filed in the Court of Appeal, the City, cited the case of *Terminal Place Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892 (1986), for the proposition that "all presumptions and intendments favor the validity of a statute and mere doubt will not afford sufficient reason for a judicial declaration of invalidity."

City's Respondent's Brief, at page 18, also cited the case of *Home Builders v. City of Napa*, 89 Cal.App.4th 897 (2001) for the proposition that an affordable housing fee did not need to specifically relate to the need created by the proposed development.

At page 4 of City's Petition for Rehearing before the Court of Appeal, the City cited the case of *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) for the proposition that there was no constitutional requirement for the fee to be related to the need for affordable housing created by the specific subdivision.

At page 4 of City's Petition for Review to the Supreme Court of the State of California, the City cited the case of *Lingle v. Chevron*, 544 U.S. 528 (2005) for the proposition that "...the substantially advances' formula...is not a valid method of identifying regulatory takings..."

The Court of Appeal rejected City's arguments regarding the lack of any necessity for a direct relation between the amount of the fee and the need created by the development. At page 444(c) of the March 20, 2009 Order Modifying Opinion, 172 Cal.App.4th 444(a), (Appendix B, pages B-5 to B-6) the court stated:

> "Accordingly, we conclude that the increase in the fee is not 'reasonably justified' as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and 'the deleterious public impact of the development.' (*San Remo*, *supra*, 27 Cal.4th at p. 671.)"

VI.

REASONS FOR GRANTING THE WRIT

This Writ of Certiorari is allowed under Rule 10(b) because the California Court of Appeal has decided a regulatory takings issue on the basis of a "reasonable relationship" test as advanced by the California Supreme Court in the *San Remo* case (*supra*). This is indistinguishable from the "substantially advances" test which was discredited by the United States Supreme Court in *Lingle v. Chevron*, 544 U.S. 528 (2005).

VII.

CONCLUSION

For the foregoing reasons, City of Patterson respectfully submits that a Writ of Certiorari should issue to review the orders and opinion of the California Court of Appeal, Fifth Appellate District.

DATED: September 3, 2009.

Respectfully submitted,

GEORGE G. LOGAN

Attorney for Petitioner
City of Patterson

APPENDIX A

Filed 1/30/09; part. pub. & mod. order 3/2/09 (see end of opn.) (171 Cal.App.4th 886 (2009))

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BUILDING INDUSTRY ASSOCIATION OF CENTRAL CALIFORNIA et al.,

Plaintiffs and Appellants,

v.

CITY OF PATTERSON,

Defendant and Respondent.

F054785
(Super. Ct. No. 610611)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. David G. Vander Wall, Judge.

Sheppard, Mullin, Richter & Hampton, David P. Lanferman and Margaret J. Pak for Plaintiffs and Appellants.

Law Office of George G. Logan and George G. Logan for Defendant and Respondent.

Morrison Homes, Inc. (Developer) obtained a development agreement and tentative subdivision maps for the construction of two residential subdivisions in Patterson, California. At the time those documents were approved, the City of Patterson (City)[1] allowed developers to pay a fee of $734 per house in lieu of building affordable housing. About three years later, City increased this fee to $20,946 per house and sought to apply the increased fee to Developer's two residential projects among others.

Developer sued City claiming that the increased fee violated (1) its vested property rights, (2) its contractual rights under the development agreement, (3) various statutory provisions, and (4) constitutional provisions requiring voter approval of special taxes. The trial court found that the increased in-lieu fee was permitted under section 4.5(d)(ii) of the development agreement and the amount of the increase was reasonably justified. The court entered judgment accordingly, and Developer appealed.[2]

We will conclude that the meaning of the contractual term "reasonably justified" presents a

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[1] For purposes of this opinion, the term "City" refers to the governmental entity and the term "Patterson" refers to the geographical area governed by that entity.

[2] Developer is joined in the appeal by the Building Industry of Central California, a California nonprofit corporation with members that own property within Patterson and are affected by the in-lieu fee.

question of law and that, under an objective test, the term is meant to incorporate the legal standards generally applied to such fees. Those legal standards require that the amount of a development fee be limited to the cost of that portion of a public program attributable to the development. City has failed to show that the increase in its in-lieu fee satisfies this standard and, therefore, has failed to show that the increase was "reasonably justified" as required by the development agreement.

The judgment is reversed and the matter remanded for further proceedings.

FACTS

Development Project

Developer owns two residential subdivisions, known as Magnolia and Bella Flora and consisting of 214 single family residential lots. The subdivisions are part of a larger development known as Patterson Gardens, which contains 305.3 acres that were divided into seven different areas or phases. Plans for Patterson Gardens included five areas of low density residential housing that covered 228.5 acres and contained a total of 985 dwelling units.

City conducted environmental and land use review in connection with its approval of the proposed development of Patterson Gardens. Also, pursuant to Government Code section 65864 et seq., City entered into a development agreement with Developer's predecessor-in-interest, dated January 21, 2003

(Development Agreement). That agreement provides for the development of Patterson Gardens and establishes certain development rights in that project.

The City Council approved the Development Agreement in January 2003, and that approval became ordinance No. 648.

Section 5.1 of the Development Agreement states that, except as the agreement provides otherwise, the developer shall pay only those fees in effect prior to the effective date of the Development Agreement and specifically listed in exhibits D-1 (residential development) and D-2 (retail/office development). Those exhibits list certain capital facility fees, connection fees, and use fees. Exhibit D-1 lists over 20 fees, including an affordable housing in-lieu fee at $734 per unit. Exhibit D-1 also states that the affordable housing in-lieu fee is referenced in section 4.5 of the Development Agreement.

Section 4.5 of the Development Agreement addresses how the parties will satisfy City's affordable housing objectives. The developer has four alternatives: (1) build affordable housing units; (2) develop senior housing within the project; (3) obtain a sufficient number of affordable residential unit credits from other residential developments within City; or (4) pay an in-lieu fee at the time the building permit is issued for a nonaffordable housing unit.

Section 4.5(d)(ii) of the Development Agreement, which is central to the contractual issues, provides in

full:

> "Developer shall pay an in-lieu fee in an as-yet undetermined amount per EDU [equivalent dwelling unit] for moderate-income housing and an as-yet undetermined amount per EDU for low and/or very low-income housing, but in no event less than the current fee of $734.00 per EDU. Developer acknowledges that the City is currently preparing an updated analysis of its Affordable Housing fee and hereby agrees to be bound by the revised fee schedule, including indexing as provided by ordinance at the time of adoption of the fee, providing the same is reasonably justified. Said fee shall be paid at the time a building permit is issued for each Non-Affordable Unit."

The City Council also adopted resolution No. 2003-05 in January 2003. The resolution approved "the combined preliminary/final development plan and vesting tentative subdivision map for the Patterson Gardens project ... subject to the conditions set forth in Exhibit E hereto." Condition No. 1 provided: "Development of Patterson Gardens shall be in accordance with the approved Final Development Plan, as modified by these conditions and as may be modified by a development agreement between the City and developer." Condition No. 1

also stated that "the terms of the development agreement will control" in the event of a conflict with the conditions.

In-Lieu Fee

City first adopted an "affordable housing in-lieu fee" in 1995. The fee originally was set at $319 per new single family home, payable as a condition to the issuance of a building permit for such construction.

In May 2001, City received a study prepared by its consulting firm, Crawford Multari & Clark Associates, which addressed certain fees and recommended raising the affordable housing in-lieu fee. That study reviewed four different approaches to calculating the affordable housing in-lieu fee. One approach, the "leverage" analysis, considered the cost of providing an affordable single family house and assumed federal or state funding would require the local government to provide only 9 percent of the total amount needed. It produced a fee of $734 per unit.

In July 2001, the City Council adopted resolution No. 2001-53, which increased the affordable housing in-lieu fee to $734 per new single family home.

In November 2005, the City Council adopted resolution No. 2005-114, which adjusted the fees allowed under certain development agreements, including the agreement for Patterson Gardens. The resolution stated that the fees assessed under the development agreements could be adjusted periodically to reflect increases in the current

construction cost index.[3] The resolution also stated that the index had experienced larger than normal increases and these increases warranted an adjustment to the fees allowed under the development agreements. The resolution adjusted certain fees, but not the affordable housing in-lieu fee.

A declaration of David Moran[4] states that, by 2003, City's strategies for supplying affordable housing were falling short. He further states that in 2003 City investigated ways to improve the supply of affordable housing, including revisions to the development impact fee. An outcome of the investigation was a "Development Impact Fee Justification Study 2005/06 Update" prepared for City by Crawford Multari & Clark Associates (Fee Justification Study). Moran is listed as one of the authors of this study.

The Fee Justification Study recommended increasing the affordable housing in-lieu fee up to

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[3] Section 5.2 of the Development Agreement gives City the right to increase the fees set forth in exhibits D-1 and D-2 but prohibits any increase in excess of the increase in a construction cost index.

[4] Moran is a senior associate with Crawford Multari & Clark Associates, a planning and consulting firm. Moran was assigned as the principal planning consultant for City before 2000. His June 2007 declaration states that he is very familiar with the planning activities of City, including the calculation, imposition, and collection of development impact fees.

$20,946 per market rate unit. This recommendation did not rely on the prior assumption (part of the "leverage" approach to calculating the fee) that the local fee could be used as leverage to obtain federal grants and loans. Instead, the recommendation was based on bridging the so-called "affordability gap" between the cost of a new market rate unit[5] and the cost of units affordable to very low, low, and moderate income households. The affordability gap analysis compared the cost of units to an estimate of what the three different income levels could afford. The difference was an estimate of the subsidy someone of that income level would need to be able to obtain housing. The analysis estimated a subsidy of $55,280 was needed for each unit of moderate income housing, a subsidy of $119,280 was needed for each unit of low income housing, and a subsidy of $167,280 was needed for each unit of very low income housing.

The next step in the calculation involved multiplying the amount of the subsidy for each income level by the number of units needed for that income category. When the three products of this multiplication were added together, the sum was the total amount of the subsidy needed for affordable housing. The Fee Justification Study identified the number of units needed for each income level by referring to Addendum No. 1 to the 2001-2002 Regional Housing Needs Assessment for Stanislaus County prepared by the Stanislaus Council of

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[5] The median price of a market rate single family dwelling in Patterson was $157,000 in 2001 and $247,280 in 2004.

Governments. [6] That document allocated 642 units of affordable housing to Patterson, consisting of 235 units of very low income, 182 units of low income, and 225 units of moderate income housing.[7]

The Fee Justification Study treated the allocation as establishing City's need for affordable housing at 642 units. The prior approach had defined the need for affordable housing by assuming that 5 percent of all new dwellings in a project should be affordable to low or very low income households and that another 5 percent should be affordable to moderate income households.

The estimates of the subsidy required per unit of affordable housing multiplied by the number of units needed for each income level produced a total subsidy of $73.5 million. The study spread this total subsidy over the 3,507 unentitled units in Patterson as of January 2005.[8] The result was the per unit fee of

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[6] Patterson is located within Stanislaus County.

[7] The Fee Justification Study described the 642-unit figure as City's "Regional Housing Needs Assessment target."

[8] The Fee Justification Study states that data available from City's Department of Finance suggest that about 5,940 dwelling units remained to be constructed in City's general plan area and 2,433 of those units previously have been entitled.

This leaves an estimate of 3,507 units unentitled. We note that if the 214 units in Developer's two subdivisions

$20,946.

In March 2006, the City Council relied on the Fee Justification Study and adopted resolution No. 2006-19, which set the affordable housing in-lieu fee at $20,946 per new single family home.

PROCEEDINGS

In October 2006, Developer filed a complaint and writ petition challenging City's imposition of the $20,946 per unit exaction as well as City's characterization that it was an increase in the affordable housing in-lieu fee.

After an initial hearing in May 2007, the trial court allowed the parties to submit additional evidence. City submitted the declaration of Moran discussed above. (See fn. 4, *ante*.) Developer objected to the declaration on a number of grounds, all of which the trial court later overruled.

After another hearing, in August 2007, the trial court reopened the case and directed the parties to provide a stipulation that attached a copy of the Regional Housing Needs Assessment for Stanislaus County prepared by the Stanislaus Council of Governments during 2001-2002 and adopted in October 2002. The parties submitted the stipulation

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had been the only unentitled units in Patterson as of January 2005, this approach would have yielded a per unit affordable housing fee of $343,458 ($73.5 million/214 units).

in October 2007.

The trial court issued its written decision on December 20, 2007. The court denied Developer's petition for writ of mandate, found for City on all causes of action, and overruled all objections. The court found that "the methodology used by [City] in determining the amount of the affordable housing fee at issue is reasonable [and] ... the absolute amount of the per-lot fee here is clearly reasonable compared to that charged in other localities, using the comparisons the parties agreed the Court could consider."[9]

DISCUSSION

I. Standards of Review

When an appellate court reviews a decision issued after a court trial, the trial court's findings on questions of fact are reviewed under the substantial evidence standard and its conclusions of law are subject to independent review. (*Brewer v. Murphy*

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[9] During oral argument, counsel indicated that the comparisons referenced were set forth in a table on page 7 of Moran's declaration. Because Developer objected to the admissibility of Moran's declaration, it does not appear from the record that the parties agreed the trial court could consider the comparisons. In this appeal, we do not reach Developer's argument that the trial court erred by admitting Moran's declaration and thus need not address whether the trial court's consideration of the comparisons was error.

(2008) 161 Cal.App.4th 928, 935-936; *Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, 918-919 [these standards are used when reviewing a decision on a traditional writ of mandate].)

II. Vested Rights Claim

Developer contends that the $20,946 fee violates its rights under the vesting tentative map and under Government Code section 65961.

We recognize that vested rights protection extends to a property owner who has obtained a vesting tentative map. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 322, fn. 3.) We conclude, nonetheless, as discussed below, that in the circumstance presented by this appeal Developer's contention about vested rights does not require a separate analysis.

A. Rights Vested by Vesting Tentative Map

City's approval of the vesting tentative map[10] was subject to conditions, and those conditions explicitly state that in the event of a conflict between the Development Agreement and the vesting tentative map, the terms of the Development Agreement shall control. Therefore, if the increased fee is authorized by the Development Agreement, it will not offend the rights established by the approval of the vesting tentative map. In other words, the right that vested

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[10] The terms "tentative map" and "vesting tentative map" are defined in Government Code section 66424.5.

when the map was approved was the right to have any increase in the affordable housing in-lieu fee comply with the terms of the Development Agreement.[11]

Consequently, the critical question in this appeal is whether the increased fee complied with the terms of the Development Agreement. If it did, then the increase will not violate any right vested under the vesting tentative map.

B. Government Code Section 65961

Government Code section 65961 prohibits local government from imposing any new condition on the issuance of a building permit when that condition could have been imposed when the vesting tentative map was approved.

In this case, if the increased fee complies with the Development Agreement, it will not be a new condition. Instead, the increased fee will have been imposed in accordance with the conditions under which the vesting tentative map was approved. As such, the increase would fall outside the scope of

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[11] The fact that the tentative vesting map in this case is subject to the terms of the Development Agreement distinguishes this case from *Kaufman & Broad Central Valley, Inc. v. City of Modesto* (1994) 25 Cal.App.4th 1577. That case did not mention the existence of a development agreement, much less a development agreement that modified the vesting tentative map and addressed the fee being disputed.

Government Code section 65961.

Conversely, if the increased fee violates the Development Agreement, we will invalidate it on that ground and need not address whether it also violated Government Code section 65961.

III. Violation of the Terms of the Development Agreement

A. Contractual Language in Dispute

The Development Agreement clearly stated that (1) the amount of the affordable housing in-lieu fee was "as-yet undetermined" when the agreement was made, and that (2) the new amount would "in no event [be] less than" $734 per unit. Whether the $20,946 fee subsequently imposed by City violated the Development Agreement centers on the meaning of the following sentence from section 4.5(d)(ii):

> "Developer acknowledges that the City is currently preparing an updated analysis of its Affordable Housing fee and hereby agrees to be bound by the revised fee schedule, including indexing as provided by ordinance at the time of adoption of the fee, providing the same is *reasonably justified*." (Italics added.)

B. Meaning of Developer's Acknowledgement

Developer contends its acknowledgement of the preparation of an updated analysis should be interpreted to mean that City was not allowed to change the method of analysis upon which it based the affordable housing fee. In Developer's view, City was allowed only to update that method of analysis and, thus, was bound to continue to use the leverage approach when calculating revisions to the affordable housing fee.

We conclude that the language in section 4.5(d)(ii) of the Development Agreement cannot be interpreted as compelling City to use a particular methodology when calculating revisions to the in-lieu fee. The reference to an "updated analysis" is not accompanied by language indicating it is a binding requirement or condition imposed on City. Instead, it is stated merely as an acknowledgement by Developer. In contrast, when the parties intended to impose a requirement or condition on the revised fee, they expressed this intent clearly. Specifically, Developer agreed to be bound by the revised fee provided it was reasonably justified. Accordingly, we reject the view that the Development Agreement required City to use the leverage approach when calculating the revised fee.

C. Meaning of "Reasonably Justified"

The parties dispute what the phrase "reasonably justified" means. City contends this standard effectively waived any legal requirements that otherwise might have applied to the fee increase. In contrast, Developer contends the standard incorporated the legal requirements applicable to the fee increase. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 752, pp. 842-843, and cases cited therein [generally, existing legal standards are implied by law into a contract].) Developer contends, in other words, that the terms cannot be interpreted as consenting to an increase that did not conform to otherwise applicable law.

"California courts have long recognized that the interpretation of a written instrument is a judicial function unless the interpretation turns upon the credibility of extrinsic evidence [citation]." *(The Lundin/Weber Co. v. Brea Oil Co., Inc.* (2004) 117 Cal.App.4th 427, 433.) In this case, the parties presented no conflicting extrinsic evidence regarding what was intended by the term "reasonably justified" at the time of contracting. Consequently, we conclude the meaning of the term "reasonably justified" presents a question of law subject to independent review on appeal. *(Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1502 [interpretation of a writing is a question of law where credibility of extrinsic evidence is not an issue].)

A court's determination of the meaning of a contract is designed "to give effect to the mutual

intention of the parties as it existed at the time of contracting ...." (Civ. Code, § 1636.) When contractual language is clear and explicit, it governs. (*Id.*, § 1638.) Alternatively, where uncertainty or ambiguity exists, the language "must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (*Id.*, § 1649.) This rule is designed to protect the objectively reasonable expectations of the promisee. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265; see generally Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs* (2001) 38 San Diego L.Rev. 53.)

Here, we conclude that an objectively reasonable person would expect the term "reasonably justified" to mean that any increase in the affordable housing in-lieu fee would conform to existing law. In other words, part of the way one would show a fee is reasonably justified is to show that it does not violate established legal principles. The contrary interpretation, which would conclude that the term did away with applicable legal requirements, would create much greater change in the relationship between the parties. An objectively reasonable person would expect more explicit language to implement such a change. Thus, it is too great a leap to infer that the term "reasonably justified" demonstrates an intention to waive applicable legal requirements.

Based on this interpretation, we next consider what legal requirements were incorporated into the Development Agreement. We have not far to look.

D. Established Legal Principles

In *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 (*San Remo*), the court considered the validity of a San Francisco ordinance addressing and limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The ordinance was enacted in response to a perceived need to preserve the availability of residential hotel rooms for the city's low-income residents who, otherwise, would have no viable housing choices. Permission to make such conversions was conditioned upon either a one-to-one replacement of the residential units converted or, among other alternatives, payment of a replacement in-lieu fee. Such an in-lieu fee thus is similar to the affordable housing in-lieu fee involved here.

Rejecting the plaintiff's argument that a form of stricter scrutiny applied to its review of the replacement in-lieu fee, the *San Remo* court said that "legislatively imposed development mitigation fees ... must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich[v. City of Culver City* (1996)] 12 Cal.4th [854,] 865, 867 (plur. opn. of Arabian, J.); id. at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.)" *(San Remo, supra*, 27 Cal.4th at p. 671.)

Similarly, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, where the court

was called upon to distinguish a fee from a special tax, the latter of which would have required two-thirds voter approval, the court said "*development fees* exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development's probable costs to the community and benefits to the developer." (*Id.* at p. 875.)

Government Code section 66001, subdivision (b) states the test this way:

> "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed."[12]

Based on these authorities, we conclude that the increase in the fee is not "reasonably justified" as required by the Development Agreement unless there is a reasonable relationship between the amount of

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[12] The version of subdivision (b) of Government Code section 66001 in effect when the Development Agreement was approved was the same, except that it contained the phrase "on or after January 1, 1989." (Stats. 1996, ch. 569, § 1.)

the fee, as increased, and "the deleterious public impact of the development." (*San Remo, supra*, 27 Cal.4th at p. 671.) In short, the Development Agreement precluded City from imposing a fee that bears no reasonable relationship to the need for affordable housing generated by Developer's project.

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study "clearly shows the need for affordable housing generated by the new construction." Though we are by no means required to do so,[13] we have examined the cited Fee Justification Study in detail. Having done so, we cannot agree that it supplies the reasonable relation between the increased fee and the need for affordable housing generated by the project.

The evidence presented in this case reveals that the amount of the fee was not calculated based on the cost of City's affordable housing need attributable to the 214 residential lots that constitute the two subdivisions owned by Developer. Neither was it

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[13] Rule 8.204(a)(1)(C) of the California Rules of Court provides that each appellate brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (See *Brewer v. Murphy, supra*, 161 Cal.App.4th at p. 936, fn. 4 [defendant's assertion of fact not supported by citation to record]; *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205 [references to exact pages required; reference to block of pages violated rule].)

based on the affordable housing need attributable to the 3,507 unentitled lots on which it was imposed. Instead, the Fee Justification Study shows that the affordable housing in-lieu fee of $20,946 per market rate unit was calculated based on an estimate of City's need for 642 units of affordable housing. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing generated by new market rate development. Accordingly, the fee calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project reflected the costs attributable to it.

We conclude, therefore, that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not "reasonably justified" within the meaning of that provision.

Based on this conclusion, we need not address (1) Developer's claim that the trial court erred by overruling its evidentiary objections to Moran's declaration or (2) Developer's arguments regarding constitutional violations.[14]

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[14] Because we have not reached the constitutional questions, we do not discuss the California Supreme Court case decided after the appellate briefing in this case was completed. (See *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 [countywide assessment to fund open space program invalidated because it failed to meet the special benefit and proportionality requirements of art. XIII D of

IV. Remedy

The appellate briefing did not address the appropriate remedy in this case. During oral argument, counsel for Developer contended that there were three possible remedies this court could direct the trial court to implement. Because the bases relevant to choosing among these and other remedies have not been developed before this court, we conclude the superior court should decide the issue of the appropriate remedy in the first instance.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings. The trial court is directed to (1) vacate its decision of December 20, 2007, (2) enter a new decision that invalidates the $20,946 per unit fee because it violates the terms of the Development Agreement and (3) determine the remedy after conducting any proceedings it deems necessary or appropriate.[15] Costs on appeal are awarded to appellants.

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the Cal. Const.].)

[15] These directions should not be interpreted to preclude the parties from agreeing on the appropriate remedy and presenting that agreement to the trial court for approval.

DAWSON, J.

WE CONCUR:

VARTABEDIAN, Acting P.J.

CORNELL, J.

Filed 3/2/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA et al.,

Plaintiffs and Appellants,

v.

CITY OF PATTERSON,

Defendant and Respondent.

F054785
(Super. Ct. No. 610611)

ORDER MODIFYING OPINION, CERTIFYING OPINION FOR PARTIAL PUBLICATION
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 30, 2009, be modified as follows:

1. On page 3, the first paragraph beginning "Developer owns" is modified to read as follows:

> Developer owns two residential subdivisions, known as Magnolia and Bella Flora and consisting of 214 single family residential lots. The subdivisions are part of a larger development known as Patterson Gardens, which contains 305.3 acres that are divided into seven different areas or phases. Plans for Patterson Gardens include five areas of low density residential housing that cover 228.5 acres and contain a total of 985 dwelling units.

2. At the top of page 4, the clause beginning "(4) pay an in-lieu fee" is modified to read:

> (4) pay an in-lieu fee at the time the building permit is issued for a market rate housing unit.

3. On page 7, the first sentence of the first paragraph of footnote 8 is modified to read:

> The Fee Justification Study states that data available from City's Department of Finance suggest that about 5,940 dwelling units remained to be constructed in City's general plan area and 2,433 of those units previously had been entitled.

4. On page 9, the fourth full paragraph beginning "In this case" is deleted and the following paragraph

inserted in its place:

> In this case, if the increased fee complies with the Development Agreement, it will have been imposed in accordance with the conditions under which the vesting tentative map was approved. Thus, the increased fee would not be a new condition, but simply would reflect the removal of uncertainty inherent in a prior condition. As such, the increase would fall outside the scope of Government Code section 65961.

5. On page 10, the first sentence of the third paragraph beginning "Developer contends" is modified to read as follows:

> Developer contends its acknowledgement of the preparation of an updated analysis should not be interpreted to mean that City was allowed to change the method of analysis upon which it based the affordable housing fee.

6. On page 11, after the first full paragraph ending "otherwise applicable law" insert the following paragraph:

> To resolve this dispute over the meaning of the Development Agreement, we assume that the ordinary rules of contract interpretation apply. No party has argued otherwise.

7. Beginning on page 12 and continuing to page

17, delete the subheading, paragraphs and footnotes of part III.D. and insert the following subheading, paragraphs and footnotes:

D. Applicable Legal Requirements

The authority of local governments to impose exactions as a condition of developing land is limited by various rules of law, including the takings clause of the California Constitution (art. I, § 19) and the federal takings clause (U.S. Const., 5th Amend.). (See *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-664 [state and federal takings clauses construed congruently] (*San Remo*).)

The general principle of takings analysis relevant to this case is the requirement that a land use regulation substantially advance a legitimate state interest. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1016.) This principle is sometimes referred to as a means-end test—that is, it requires the property regulation in question (the means) to advance the purpose the government is seeking to achieve (the end). (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 975 [conc. opn. of Kennard, J.].) The "substantially advance" principle is implemented by using different levels of scrutiny depending upon the circumstances. (*San Remo, supra*, 27 Cal.4th at p. 665.) Therefore, to apply the "substantially advance" principle in this case, we must decide which level of scrutiny applies to City's increase in its affordable housing in-lieu fee. *San Remo* provides guidance on this question.

In *San Remo,* owners of a hotel sued to invalidate a San Francisco ordinance limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The purpose of the ordinance was to preserve the availability of residential hotel rooms for the city's low-income residents who, otherwise, would have had no viable housing options. To achieve that goal, the ordinance required a hotel converting a residential hotel unit into a tourist unit to replace the residential unit elsewhere, pay a fee in-lieu of providing the replacement unit, or take other action that would further replacement. Pursuant to the ordinance, the city issued the hotel owners a conditional use permit authorizing the conversion of hotel rooms only upon compliance with one of those alternatives.

The hotel owners filed suit, alleging the ordinance was unconstitutional because it violated the state takings clause. They argued that *Nollan / Dolan / Erhlich*[12] scrutiny applied to the court's review of the replacement in-lieu fee. The *Nollan / Dolan / Erhlich* heightened level of constitutional scrutiny inquires whether an "essential nexus" and "rough proportionality" are shown between an ad hoc exaction, imposed as a condition of development, and the impact of that development. (*San Remo, supra*, 27 Cal.4th at pp. 665-667, 671.) The *San Remo* court refused to apply this heightened level of scrutiny to the San Francisco ordinance, stating:

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[12] *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 837; *Erhlich v. City of Culver City* (1996) 12 Cal.4th 854.

> "Nor are plaintiffs correct that, without *Nollan / Dolan / Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich, supra,* 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.) ... While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." (*San Remo, supra*, 27 Cal.4th at p. 671.)[13]

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[13] The statutory provision referenced in this quote states its test this way: "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee

Similarly, the court in *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, refused to apply the *Nollan / Dolan / Ehrlich* test when analyzing the facial validity of an ordinance of general application that required construction of affordable multifamily housing as a condition to development of multifamily ownership projects. (*Action Apartment Assn. v. City of Santa Monica*, at pp. 469-471.)[14]

---

and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (Gov. Code, § 66001, subd. (b).) We note that section 66001 expressly applies to fees imposed to mitigate the effects of development on "public facilit[ies]." We express no opinion on the question whether section 66001, or the Mitigation Fee Act in general (see Gov. Code, § 66000.5), applies to affordable housing in-lieu fees.

[14] We note that the court in *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188 (*Home Builders*) considered a takings clause challenge to the facial validity of an inclusionary zoning ordinance and upheld its validity. In this appeal, Developer has attempted to distinguish *Home Builders* by arguing that case did not involve a development agreement, vested rights or judicial review in an "as applied" context. Because Developer has not argued that the affordable housing in-lieu fee is facially invalid, we do not decide the question of facial invalidity here. We also note that *Home Builders* was decided about nine months before the California Supreme Court decided *San Remo*.

Also, we note that the takings clause requirements are more restrictive than the requirement that a land use

Upon examination, it appears that the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*. Both are formulaic, legislatively mandated fees imposed as conditions to developing property, not discretionary ad hoc exactions. (*San Remo, supra*, 27 Cal.4th at p. 671.) We conclude, for this reason, that the level of constitutional scrutiny applied by the court in San Remo must be applied to City's affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement.

Accordingly, we conclude that the increase in the fee is not "reasonably justified" as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and "the deleterious public impact of the development." (*San Remo, supra*, 27 Cal.4th at p. 671.)

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study "clearly shows the need for affordable housing generated by the new construction." Despite the lack of an argument from City addressed to the reasonable relationship test, we

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regulation promote a legitimate public purpose to be an authorized exercise of the police power. (See City of Hanford v. Hernandez (2007) 41 Cal.4th 279 [zoning ordinance regulating economic competition was a legitimate exercise of municipality's police power].)

have examined the cited Fee Justification Study in detail, as well as Moran's declaration and other documents, to determine whether the test is satisfied by the information provided. In the process, we have located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project.

The record in this matter reveals no reasonable relationship between the extent of City's affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of $20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001-2002 Regional Housing Needs Assessment for Stanislaus County. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project.

For this reason, we conclude that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not "reasonably justified" within the meaning of that provision.

There is no change in the judgment.

The opinion in the above-entitled matter filed on January 30, 2009, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports with the exception of parts I. and II.B., and it is so ordered.

_____

DAWSON, J.

WE CONCUR:

_____

VARTABEDIAN, Acting P.J.

_____

CORNELL, J.

APPENDIX B

Filed 3/20/09 (172 Cal.App.4th, 444a)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA, et al.,

Plaintiffs and Appellants,

v.

CITY OF PATTERSON,

Defendant and Respondent.

F054785

(Super. Ct. No. 610611)

**ORDER MODIFYING OPINION,
AND DENYING REHEARING**
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 30, 2009, and modified on March 2, 2009, be further modified as follows:

1. On page 12 of the opinion filed January 30, 2009, in the second full paragraph beginning "Based on this interpretation" delete the second sentence.

2. Omit item No. 7 of the modification filed March 2, 2009.

3. Beginning on page 12 and continuing to page 14 of the opinion filed January 30, 2009, delete the subheading, paragraphs and footnotes of part III.D. and insert the following subheading, paragraphs and footnotes, which will require renumbering of subsequent footnotes:

D. Applicable Legal Requirements

In *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-664 *(San Remo)*, owners of a hotel sued to invalidate a San Francisco ordinance limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The purpose of the ordinance was to preserve the availability of residential hotel rooms for the city's low-income residents who, otherwise, would have had no viable housing options. To achieve that goal, the ordinance required a hotel converting a residential hotel unit into a tourist unit to replace the residential unit elsewhere, pay a fee in-lieu of providing the replacement unit, or take other action that would further replacement. Pursuant to the ordinance, the city issued the hotel owners a conditional use permit authorizing the conversion of hotel rooms only upon compliance with one of those alternatives.

The hotel owners filed suit, alleging the ordinance was unconstitutional because it violated the state takings clause. They argued that *Nollan / Dolan / Erhlich*[12] scrutiny applied to the court's review of the replacement in-lieu fee. The *Nollan / Dolan / Erhlich* heightened level of constitutional scrutiny inquires whether an "essential nexus" and "rough proportionality" are shown between an ad hoc exaction, imposed as a condition of development, and the impact of that development. (*San Remo, supra*, 27 Cal.4th at pp. 665-667, 671.) The *San Remo* court refused to apply this heightened level of scrutiny to the San Francisco ordinance, stating:

> "Nor are plaintiffs correct that, without *Nollan / Dolan / Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleteriouss public impact of the development. (Gov. Code, § 66001; *Ehrlich, supra*, 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut*

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[12] *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 837; *Erhlich v. City of Culver City* (1996) 12 Cal.4th 854.

> *Creek* (1971) 4 Cal.3d 633, 640.) ... While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." (*San Remo, supra*, 27 Cal.4th at p. 671.)[13]

Similarly, the court in *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, refused to apply the *Nollan / Dolan / Ehrlich* test when analyzing the facial validity of an ordinance of general application that required construction of affordable multifamily housing as a condition to development of multifamily ownership projects.

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[13] The statutory provision referenced in this quote states its test this way: "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (Gov. Code, § 66001, subd. (b).) We note that section 66001 expressly applies to fees imposed to mitigate the effects of development on "public facilit[ies]." We express no opinion on the question whether section 66001, or the Mitigation Fee Act in general (see Gov. Code, § 66000.5), applies to affordable housing in-lieu fees.

(*Action Apartment Assn. v. City of Santa Monica*, at pp. 469-471.)[14]

Upon examination, it appears that the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*. Both are formulaic, legislatively mandated fees imposed as conditions to developing property, not discretionary ad hoc exactions. (*San Remo, supra*, 27 Cal.4th at p. 671.) We conclude, for this reason, that the level of constitutional scrutiny applied by the court in *San Remo* must be applied to City's affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement.

Accordingly, we conclude that the increase in the fee is not "reasonably justified" as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and "the deleterious public impact of the

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[14] We note that the court in *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188 (*Home Builders*) considered a takings clause challenge to the facial validity of an inclusionary zoning ordinance and upheld its validity. In this appeal, Developer has attempted to distinguish *Home Builders* by arguing that case did not involve a development agreement, vested rights or judicial review in an "as applied" context. Because Developer has not argued that the affordable housing in-lieu fee is facially invalid, we do not decide the question of facial invalidity here. We also note that *Home Builders* was decided about nine months before the California Supreme Court decided *San Remo*.

development." (*San Remo, supra*, 27 Cal.4th at p. 671.)

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study "clearly shows the need for affordable housing generated by the new construction." Despite the lack of an argument from City addressed to the reasonable relationship test, we have examined the cited Fee Justification Study in detail, as well as Moran's declaration and other documents, to determine whether the test is satisfied by the information provided. In the process, we have located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project.

The record in this matter reveals no reasonable relationship between the extent of City's affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of $20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001-2002 Regional Housing Needs Assessment for Stanislaus County. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee

calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project.

For this reason, we are persuaded that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not "reasonably justified" within the meaning of that provision.[15]

There is no change in the judgment.

Respondent's petition for rehearing is denied.

DAWSON, J.

WE CONCUR:

VARTABEDIAN, Acting P.J.

CORNELL, J.

[15] The record in this case appears fully developed as to the reasoning process City used when increasing the fee. Thus, this is not a case where the question whether the increase was "reasonably justified" was resolved based on the sufficiency of the proof. In other words, the actual reasoning process City used does not satisfy the contractual standard set by the parties.

APPENDIX C

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
No. F054785
S171536

IN THE
SUPREME COURT OF CALIFORNIA
EN BANC

SUPREME COURT
F I L E D
JUN 17 2009
Frederick K. Ohlrich
Clerk

Deputy

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA,
Plaintiff and Appellant,
v.
CITY OF PATTERSON,
Defendant and Respondent.

The petition for review is denied.

The requests for an order directing depublication of the opinion are denied.

Werdegar, J., was recused and did not participate.

/s/ George
Chief Justice

APPENDIX D

Law Office of George G. Logan
2669 Alabama Street
Atwater, CA 95301
(209) 357-1431
Attorney for Defendant
City of Patterson

SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF STANISLAUS

F I L E D
2008 FEB - 1 AM 11:41
Clerk of the Superior Court
County of Stanislaus
By _____
Deputy

In re:

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA, et al.,
Plaintiff,

v.

CITY OF PATTERSON, et al.,
Defendants.

Case Number: 610611
JUDGMENT AFTER TRIAL
BY SUPERIOR COURT
[Code Civ. Proc. § 632]

Date: August 9, 2007
Time: 9:30 a.m.
Dept.: 1

This cause came on regularly for trial on August 9, 2007, in Department 1 of the above-entitled court, the Honorable VanderWall, Judge, presiding, sitting without a jury. Plaintiff appeared by its attorney David Lanferman. Defendant appeared by its attorney George Logan. Evidence having been presented by both parties, the cause having been argued and submitted for decision,

IT IS ORDERED, ADJUDGED, AND DECREED that

1. Judgment is ordered on behalf of the Defendant;

2. Defendant shall recover its costs.

Dated: Jan. 24 2008

/s/ David G. Vander Wall
DAVID G. VANDER WALL,
Judge of the Superior Court

SUPERIOR COURT,
STATE OF CALIFORNIA,
COUNTY OF STANISLAUS

BUILDING IND. ASSOC., ET AL
Plaintiff(s)
v
CITY OF PATTERSON, ET AL
Defendant(s)

NATURE OF HEARING:

DECISION ON SUBMISSION Case No: 610611

Judge: DAVID G. VANDERWALL
Clerk: René Weaver Bailiff: Lucchesi
Reporter: None Date: 12-20-07
Modesto, CA.

APPEARANCES: None

This matter came on calendar 8-9-07 for a hearing on Writ of Mandate. Counsel, David P. Lanferman appeared for Plaintiffs and counsel, George G. Logan appeared with Defendants. Following the hearing Post-Trial Briefs were ordered and the matter stood submitted as of 8-30-07. The matter was re-opened, by the Court's minute order of 9-25-07, for further evidence, and resubmitted on October 19, 2007.

All pleadings and arguments having been heard, read and considered Court makes the following findings and orders:

Plaintiffs/Petitioners Building Industry Association of Central California and Morrison Homes, Inc., bring an action challenging the City of Patterson's imposition of a $20,000 per lot affordable housing fee on a new housing development. The causes of action are for declaratory relief, restitution of the fees, injunctive relief, invalidation of the fee, and petition for writ of mandamus.

Plaintiffs now concede that the predecessor in interest of Morrison Homes made a development agreement with defendant City of Patterson concerning this development in which the predecessor, and now Morrison, became obligated to pay an affordable housing fee of some sort for each lot in the development. Plaintiffs' challenge is now limited to the amount of this housing fee.

The dispute presently before the Court concerns the City's increase in the affordable housing fee after the tentative map was approved. An increase of some sort was allowed under the development agreement. It would have been unlawful absent the development agreement.

Plaintiff's concession that the City is entitled to increase the affordable housing fee is not a concession that the fees in dispute are proper. Plaintiffs here contend that the disputed fee is unreasonable in amount.

Plaintiffs have complied with all conditions precedent and exhausted any available administrative remedies required to challenge the

reasonability of the disputed fee. The matter is ripe for resolution by the Court.

The petition for writ of mandate is DENIED. The Court finds for defendant City of Patterson on all causes of action. All objections are OVERRULED.

Defendant City has the burden of showing that the disputed fee is reasonable in amount. *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 878-879.

The development agreement at issue was made in January 2003. The Affordable housing needs of the City of Patterson were identified and computed in the Regional Housing Needs Assessment for Stanislaus County prepared by the Stanislaus Council of Government during 201-2002 and adopted in October 2002, three months before the parties made the development agreement at issue., This document was amended in 2003 by Addendum No. 1.

Page ii of Addendum No. 1 to the October 2002 Regional Housing Needs Assessment identifies the number of units of housing required by the City of Patterson as 235 for very low moderate income residents. This 642 unit total was used by defendant's consultants, Crawford Multari & Clark Associates, in preparing the 2005/2006 Development Fee Impact Study upon which defendant bases the disputed amount of its affordable housing fee. See page 13 of Exhibit 4 to the April 2, 2007, moving declaration of David Lanferman.

Plaintiffs' challenge to the 642-unit total need, on the grounds that it includes past unmet needs, was rejected by *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188, 198. Government Code section 66001(g) applies to public facilities. Publically owned housing would be public facilities, but the fee at issue is for publically subsidized private affordable housing. Plaintiffs' contention here is based on the assumption that Government Code section 66001(g) refers to public "needs", as opposed to public "facilities".

The Court finds, based upon the evidence submitted, that the methodology used by defendant in determining the amount of the affordable housing fee at issue is reasonable. That there might be other methodologies which are also reasonable does not mean that the one in dispute is unreasonable. The Court also finds that the absolute amount of the per-lot fee here is clearly reasonable compared to that charged inn other localities, using the comparisons the parties agreed the Court could consider. The major question here, however, is whether defendant City of Patterson's methodology in computing the fee is reasonable. It is.

Defendant City of Patterson shall have judgment and costs.

Cc:

Sheppard Mullin, Richter & Hampton LLP
David P. Lanferman, Esq.
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109

George G. Logan, Esq.
2669m Alabama Street
Atwater, CA 95301

Building Inc v City of Patterson 12-20-07

(2)

No. 09-317

Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CITY OF PATTERSON, CALIFORNIA,

Petitioner,

v.

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA
and MORRISON HOMES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The California Court Of Appeal,
Fifth Appellate District**

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID P. LANFERMAN, Cal. Bar No. 71593
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
TEL: 415-434-9100
FAX: 415-434-3947

*Attorney for Respondents
Building Industry Association of Central California
and Morrison Homes, Inc.*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the California Court of Appeal err by holding that California's legal standards generally applicable to development fees and exactions require that an "affordable housing in lieu fee" that is levied by a City upon developers of residential subdivisions as a condition of building permit issuance be reasonably related to the need for affordable housing created by the residential subdivision?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The respondent, Building Industry Association of Central California, is a non-profit corporation, with no publicly issued stock.

The respondent, Morrison Homes, Inc., is now an entity known and doing business as Taylor Morrison of California, LLC, a California limited liability company, and is not itself publicly traded. During the course of this litigation, Morrison Homes Inc. was involved in a merger with Taylor Woodrow Inc., which in turn was acquired by a corporation based in the United Kingdom known as Taylor Wimpey PLC; and Taylor Morrison of California, LLC is now a wholly-owned subsidiary of Taylor Wimpey PLC. Taylor Wimpey PLC is organized under the laws of the United Kingdom and is publicly traded (LSE: TW).

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STATEMENT OF THE CASE

The plaintiffs brought an action in the California state courts for declaratory relief/writ of mandamus, for interpretation and enforcement of a development agreement, under the state laws of California. The case involves a challenge to the City's imposition of "affordable housing in lieu fees" against a residential development project, including the issue upon which the California Court of Appeal decided the case: whether the City's imposition of a "revised" housing fee (at the new rate of $20,946 per home rather than the previous rate of $734 per home) was consistent with the terms of the development agreement.

The California Court of Appeal applied state law in its interpretation of the contractual language, which allowed for the imposition of a "revised" housing fee against the development project, so long as any such revised fee was shown to be "reasonably justified." The Court searched the evidentiary record, found that the new housing fees were not "reasonably justified" as that term is construed under existing California law applicable to development fees, and held that the City's imposition of new housing fees did in fact breach the development agreement. "For this reason, we conclude that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not 'reasonably justified' within the meaning of that provision." (*Building Industry Ass'n v. City of Patterson,* 171 Cal.App.4th 886, 899 (2009).)

Factual Background:

The facts of the case are well stated in the Court of Appeal's opinion (*Building Industry Ass'n et al. v. City of Patterson*, 171 Cal.App.4th 886, 90 Cal.Rptr.3d 63 (2009).) The City's petition does not appear to question the appellate court's summary of the facts.

The case arose out of a comprehensive development agreement between the City of Patterson and land developer, predecessor in interest to the plaintiff Morrison Homes. The development agreement, authorized by California's development agreement statute (Cal. Government Code § 65864), set out the rules, regulations, conditions, and development fees that would be applicable to the plaintiff's approved residential development project during the anticipated long-term build-out of the subdivision.

The case was decided on the basis of the Court of Appeal's interpretation of the contractual language used in the development agreement. The agreement provided, in part, that the development would be obligated to comply with the City's then-existing affordable housing policies. At the time the development agreement was executed in January 2003, those City affordable housing policies called for the developer either making a certain percentage of new homes in the subdivision available to lower income residents at privately-subsidized costs, or, at the developer's election, paying the City a fee "in lieu" of providing subsidizing housing units. The City's fee

was then set at a rate of $734 per new home building permit.

The development agreement also included a clause, however, which recited that the City was supposedly then in the process of updating its affordable housing in lieu fees. The agreement provided that the development agreed to be bound by a revised fee schedule that was anticipated to emerge from the updated analysis, and would pay the revised in lieu fee, at a rate no less than the existing rate of $734 per home – provided that any such revised in lieu fee was "reasonably justified."

The City did not immediately adopt any such revised housing fee. Instead, in November 2005, the City Council adopted an amended schedule of development fees which maintained the "affordable housing in lieu fee" at the existing rate of $734 per house (Council Res. No. 2005-114, JA 1099). Three years after it entered into the development agreement, in March 2006, the City adopted a new approach to establishing its "affordable housing in lieu fees" and adopted a new resolution setting its new "in lieu fees" at the rate of $20,946 per new single family home building permit.

When the City began imposing its new $20,946 fee against the plaintiff's approved project, plaintiff objected, paid the disputed fees under protest (as provided by California law, Government Code §§ 66020, 66021) and filed suit for relief.

Procedural Background:

The Complaint was filed in the Stanislaus County Superior Court in October 2006, and following a bench trial on the documentary record, the trial judge issued a decision in favor of the City in December 2007. Plaintiffs timely appealed to the Court of Appeal, Third Appellate District.

The Court of Appeal issued its unanimous decision on January 30, 2009, reversing the lower court, and holding that the City's imposition of the new $20,946 affordable housing in lieu fee violated the development agreement, because that fee was not "reasonably justified" under California's legal standards generally applicable to legislatively-enacted development fees.

The Court of Appeal subsequently issued an order on March 2, 2009, modifying its opinion in part, but not affecting the result, and certifying the opinion for publication as provided by the California Rules of Court. On March 20, 2009, the Court of Appeal issued its order denying the City's petition for rehearing, and further modifying a portion of the opinion but not changing the holding of the Court.

The California Supreme Court unanimously (with one recusal) denied the City's subsequent petition for review on June 17, 2009, and denied requests for depublication of the Court of Appeal's opinion.

REASONS FOR DENYING THE WRIT

The City's petition for a writ of certiorari should be denied, because it fails to demonstrate any of the grounds indicated by Rule 10.

The petition mis-states the "issue presented" by this case. The Court of Appeal decided this case by interpreting a written agreement – a matter of state law – as calling for the application of the "legal standards generally applied to such [legislatively-enacted development] fees" as previously described by the California Supreme Court. The Court concluded that the City's new fees were not "reasonably justified" under California law, because they failed to satisfy the legal standards for such fees. The Court accurately explained that those standards "require that the amount of a development fee be limited to the cost of that portion of a public program attributable to the development" (citing *San Remo Hotel v. City & County of San Francisco,* 27 Cal.4th 643, 671, 117 Cal.Rptr.2d 269, 41 P.3d 87 (2002).) The Court of Appeal searched the record and reported that it could locate "nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project." (171 Cal.App.4th 886, 899.)

The California Supreme Court denied the City's petition for review, and its request for de-publication of the Court of Appeal's decision, implicitly rejecting the City's claim of error in applying existing California law.

Nothing in the Court of Appeal's decision conflicted with the decision of another state court of last jurisdiction or of a United States court of appeal, nor with any decision of this Court (cf. Rule 10(b) and 10(c), erroneously invoked by the City in its petition.).

The new contention in the City's petition that the "reasonable relationship" test in the Court of Appeal opinion is "indistinguishable" from "the 'substantially advances' test which was discredited by the Court in *Lingle v. Chevron*, 544 U.S. 528 (2005)" is without merit.

This Court's opinion in *Lingle v. Chevron, supra,* did not "discredit" the "substantially advances" test, but rather clarified that such a test is not a relevant inquiry in a regulatory takings challenge, but rather is more suited to a due process challenge to a regulation. This case was not decided on the basis of either, but rather on the basis of contractual interpretation, and application of the legal standards generally applicable to development exactions.

This Court's opinion in *Lingle v. Chevron, supra*, explicitly emphasized that it was not intended to disturb, much less "discredit," the Court's prior decisions on the standards applicable to such development exactions (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).) California has generally applied the Court's "reasonable relationship" standards for development exactions to monetary fees imposed as conditions of development approval, such as the City's in lieu fees, although purporting to distinguish

between "legislatively enacted" exactions or fees of broad application and quasi-adjudicatory or ad hoc project specific exactions as to the level of judicial scrutiny to be applied to such fees or exactions. (See, e.g., *Ehrlich v. City of Culver City,* 12 Cal.4th 854 (1996); *San Remo Hotel, supra*, 27 Cal.4th at 665-672; see also, the California Mitigation Fee Act, Government Code sections 66000 *et seq.*).

Moreover, the City's petition cites no authority, and provides no argument, to try to support its new contention that the "reasonable relationship" legal standard applied under California law to development fees and exactions as in this case is in fact "indistinguishable" from the "substantially advances" test as it may have been previously used in the context of "regulatory takings" claims. To the contrary, the Court expressly explained that the rule those decisions (*Nollan* and *Dolan*) established for development exactions "is entirely distinct from" the "substantially advances" test that the Court was expounding in *Lingle*. (*Lingle, supra*, 544 U.S. at 547.)

The writ should also be denied because the City failed to previously raise the "issue" it now seeks to present to this Court. The Court of Appeal pointed out that the City had *not* argued on appeal for the application of any "different test" or legal standard in determining whether the City's $20,946 in lieu fees were reasonably justified (171 Cal.App.4th 886, at 899.) "Despite the lack of an argument from City addressed to the reasonable relationship test, we have examined the [record] to determine whether the

test is satisfied by the information provided." As previously stated, the Court of Appeal could find "nothing" in the evidentiary record even implying that the City had met this requirement.

CONCLUSION

The case presents nothing more than the interpretation and application of state law. No federal question was ever presented to the California courts.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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